

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

NO. CR. 92-00001 WBS

Plaintiff,

v.

MEMORANDUM AND ORDER RE:
MOTION TO SET ASIDE OR REMIT
BOND FORFEITURE

DONELL HATCHER,

Defendant.

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The surety on defendant Donell Hatcher's bail bond, Loyce Hatcher, filed this motion through his attorney-in-fact, Montel Hatcher, to set aside the stipulation of bond forfeiture pursuant to Federal Rule of Criminal Procedure 46(f)(2) or in the alternative, to remit the cash bond of \$125,000 pursuant to Rule 46(f)(4).

I. Factual and Procedural Background

On October 23, 1992, defendant Donell Hatcher was released on a property bond of \$150,000 posted by his father, Loyce Hatcher, and secured by his father's house. (Mot. to Set

1 Aside Forfeiture 2; Opp. Mot. to Set Aside Ex. A.) On September
2 30, 1993, defendant was believed to have violated the conditions
3 of his pretrial release, and the United States moved to revoke
4 his release. (Mot. to Set Aside Forfeiture at 3; Docket No.
5 1320.) A bench warrant was issued for his arrest on October 1,
6 1993. (Mot. to Set Aside Forfeiture at 3.) Defendant remained a
7 fugitive until his arrest in 2006 in Alabama on narcotics
8 charges. (Id.; see United States v. Hatcher, CR No. 03-00144 KOB
9 RRA (N.D. Ala.).)

10 While defendant was a fugitive, Loyce Hatcher developed
11 Alzheimer's disease and gave his other son, Montel Hatcher, a
12 durable power-of-attorney to manage his affairs. (Mot. to Set
13 Aside Forfeiture at 3.) Toward the end of 2007, the house used
14 as security for the bond was threatened with foreclosure and the
15 lien created a cloud upon the title. (Id.) To assist with the
16 sale, on December 28, 2007, defendant's then-counsel stipulated
17 with the United States to substitute a cash bond of \$150,000 for
18 the lien on Loyce Hatcher's house (now owned by Montel Hatcher).
19 (Mot. to Set Aside Forfeiture 3; Opp. Mot. to Set Aside
20 Forfeiture Ex. F.)) A new stipulation signed on February 21,
21 2008 reduced the bail to \$125,000 in exchange for a reconveyance
22 of the United States's security interest in the Loyce Hatcher
23 home, and an agreement that the \$125,000 bail amount was
24 forfeited to the United States. (Opp. Mot. to Set Aside
25 Forfeiture Ex. G.) An order to this effect was entered by the
26 court on February 22, 2008. (Id.) Thereafter, the bond was
27 forfeited and the funds conveyed to the Clerk's office. (Id.)

28 On August 8, 2008, the defendant filed a pro se motion

1 seeking relief from forfeiture and a return of the bail. (Opp.
2 Mot. to Set Aside Forfeiture Ex. H.) Now, Montel Hatcher, acting
3 pursuant to his power-of-attorney for the surety on defendant's
4 bond, Loyce Hatcher, seeks to set aside the bond forfeiture.

5 II. Discussion

6 A. Statute of Limitations on the Forfeiture

7 Under federal law, the United States' forfeiture action
8 accrues and the six-year statute of limitations period begins to
9 run when the bail bond agreement is breached. United States v.
10 Toro, 981 F.2d 1045 (9th Cir. 1992); see 28 U.S.C. § 2415 (2006)
11 ("[E]very action for money damages brought by the United States .
12 . . which is founded upon any contract . . . shall be barred
13 unless the complaint is filed within six years after the right of
14 action accrues.").

15 In this case, the statute of limitations on the
16 government's lien over the surety's house had run such that the
17 government could no longer move for forfeiture. The statute of
18 limitations does not extinguish a debt but merely bars the
19 remedy. McCormick v. Brown, 36 Cal. 180 (1868). The government
20 and defendant signed a stipulation providing that the bond would
21 be reduced by \$25,000 and would nonetheless be forfeited. This
22 in itself makes the stipulation a valid contract for
23 consideration. Therefore, unless there are valid grounds for
24 rescission, as between defendant and the government, the
25 stipulation is valid despite the fact that the statute of
26 limitations on the government's forfeiture remedy had run.

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1 B. Whether the Stipulation Is Binding on the Surety

2 The surety argues that the February 21, 2008
3 stipulation between the United States and defendant Hatcher
4 declaring the bond forfeited is not binding on the surety because
5 it was not a party to the stipulation. The stipulation provided
6 that: "The sum of \$125,000 shall be deemed full and complete
7 forfeiture of said bond and defendant and all sureties hereby
8 relinquish any further claim, right, or entitlement to said
9 amount of \$125,000." (Decl. Barton in Support of Mot. to Set
10 Aside Forfeiture Ex. G) (emphasis added). The surety in this
11 case, however, did not sign the stipulation; only the government
12 and counsel for defendant Hatcher signed it. (Id.)

13 The United States argues that United States v.
14 Vera-Estrada, 577 F.2d 598 (9th Cir. 1978), is controlling. In
15 Vera-Estrada, the defendant failed to appear in District Court
16 and his bail bond was ordered forfeited. The government noticed
17 the sureties only when it moved for judgment on the forfeiture.
18 The sureties in that case appealed, arguing that under the
19 California Penal Code § 1305(a) their liability was conditional
20 on the clerk's notifying them of the forfeiture within thirty
21 days. The court held only that § 1305(a) was not an implied term
22 of the bail bond contract and that notice is required only when
23 the government moves for judgment on the forfeiture. Id. at
24 599-600. Vera-Estrada is silent as to the question here: whether
25 a stipulation altering the amount of the bond and declaring
26 forfeiture on the bond after the statute of limitations had
27 passed binds a non-party surety.

28 Under general common law principles, judgment may not

1 be entered against one not a party to the action. Valley Nat.
2 Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332 (9th Cir. 1997).
3 This principle protects the procedural due process rights of the
4 unnamed party. Id. In certain circumstances, however, parties
5 can bind non-parties by their contracts or judgments. The common
6 law relationship of privity, for example, is a legal relationship
7 "in which two parties have identical or transferred rights with
8 respect to a particular legal interest." Headwaters Inc. v. U.S.
9 Forest Service, 399 F.3d 1047 (9th Cir. 2005) (listing
10 traditional privity relationships); see also Richards v.
11 Jefferson County, Ala., 517 U.S. 793, 798 (1996) ("[T]he term
12 'privity' is now used to describe various relationships between
13 litigants that would not have come within the traditional
14 definition of that term. . . . [I]n certain limited
15 circumstances, a person, although not a party, has his interests
16 adequately represented by someone with the same interests who is
17 a party.") (quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989)
18 (superceded by statute)) (internal quotations omitted).

19 The relationships that are broader than traditional
20 privity where parties can bind non-parties have been referred to
21 as "virtual representation." See Irwin v. Mascott, 370 F.3d 924
22 (9th Cir. 2004). For a party to bind a non-party by virtual
23 representation, there must be (1) a close relationship between
24 the parties; (2) the non-party had substantial participation in
25 or control in the process; and (3) the party's and non-party's
26 interests were aligned and common, such that the party could
27 adequately represent the non-party's interests. Irwin, 370 F.3d
28 at 929-30.

1 Because the surety was not a party to the stipulation,
2 it can be bound to it only if he was "virtually represented" by
3 the defendant when the stipulation was signed. Id. Applying the
4 first factor, the court finds that defendant had a close
5 relationship with the surety. The surety is the defendant's
6 father, and the surety's attorney-in-fact is the defendant's
7 brother. Furthermore, the defendant was apparently living with
8 his father when he was originally released on bail in 1992.
9 (Opp. Mot. to Set Aside Forfeiture Ex. A.) The first element of
10 the test-a close relationship between the parties-is clearly met.
11 See, e.g., Trevino v. Gates, 99 F.3d 911, 923-24 (9th Cir. 1996)
12 (grandchild-grandparent relationship supports collateral estoppel
13 on virtual representation theory).

14 However, the second element-substantial participation
15 or control in the process-is not so clearly present. The
16 government points to the fact that the surety and his attorney-
17 in-fact at times paid for defendant's counsel, and that
18 defendant's counsel in Alabama and California attempted to
19 substitute a cash bond in place of the lien on the surety's home.
20 (Opp. Mot. to Set Aside Forfeiture 9; Docket No. 2024 ¶ 5.)
21 Defendant's counsel in Alabama sought to exonerate and cancel the
22 bond, an act that presumably would have been on behalf of the
23 surety and not the defendant. (Opp. Mot. to Set Aside Forfeiture
24 9; Ex. D.) The surety in this case also benefitted by having the
25 bond reduced \$25,000 in the stipulation.

26 These facts, however, suggest at best that defendant
27 intended the surety to be a third-party beneficiary to any
28 stipulation reducing the bond. The government has failed to

1 point to any facts that compel the conclusion that the surety was
2 participating in or controlling the stipulation negotiations with
3 the government. While Montel Hatcher states that he had
4 previously paid defendant's Alabama and California counsel to
5 "attempt to get the lien removed" and "to get the government to
6 release the lien on the real property and reduce the amount of
7 the bond" (Decl. Montel Hatcher ¶ 6), neither of these efforts
8 speak directly to the stipulation at hand. Furthermore, the
9 stipulation signed by defendant reconveyed the security interest
10 in Loyce Hatcher's home to the government. (Opp. Mot. to Set
11 Aside Forfeiture Ex. G.) Given that this was the outcome that
12 the surety had been attempting to avoid all along, Montel
13 Hatcher's statements cut against finding that the surety was
14 controlling or participating in the stipulation negotiation
15 process.

16 Finally, the third element-commonality of interests-is
17 clearly absent here. The defendant in this case could not have
18 adequately represented the interests of the surety in his bond
19 negotiations with the government. While defendant is the
20 surety's son, he fled while on bail and knowingly and willingly
21 subjected his father's house to forfeiture. Additionally, the
22 stipulation was made at a time when the defendant was facing
23 sentencing on his prior narcotics convictions and possible
24 charges for fleeing on bail. When defendant agreed to forfeit
25 \$125,000 of the bond, he was motivated by a desire to placate and
26 appease the government in exchange for a favorable sentencing
27 recommendation or leniency. The surety would have had no such
28 similar motive. Agreeing to the stipulation would be one way for

1 the defendant to curry favor with the government. This apparent
2 conflict of interest itself is enough to find that the third
3 prong of the test for virtual representation is not met. The
4 surety's interest was and remains avoiding the forfeiture of the
5 bond. While the defendant might have had good intentions when he
6 stipulated to a reduced bail amount in exchange for the
7 forfeiture, this does not equate to a common interest sufficient
8 to bind the surety in contract. Therefore, the surety is not
9 bound by the provisions of the stipulation and it is
10 unenforceable against him.

11 C. Rescission for Mutual Mistake

12 Alternatively, the court finds that the stipulation is
13 voidable because it was based on a mutual mistake of law. Under
14 the general law of contracts, contracts premised on a mutual
15 mistake of fact are voidable where the mistake concerns a basic
16 assumption on which the contract was made and materially affects
17 the agreement. See Restatement 2d § 152. In the Ninth Circuit,
18 a mutual mistake of law can also excuse performance on a
19 contract. See Gayle Mfg. Co. v. Federal Sav. & Loan Ins. Corp.,
20 910 F.2d 574, 582 (9th Cir. 1990) ("The law has long recognized
21 that it is unjust to permit either party to a transaction, in
22 which both are laboring under the same mistake, to take advantage
23 of the other when the truth is known.") A mutual mistake renders
24 a contract voidable on the theory that a material difference of
25 understanding prevents the manifestation of mutual assent
26 necessary to create a contract at all. See Local Motion, Inc. v.
27 Niescher, 105 F.3d 1278, 1280 (9th Cir. 1997).

28 The surety seeks to rescind the stipulation because it

1 was based on the mutual mistake that the government still had the
2 right to seek forfeiture on the bond. As discussed above, the
3 surety was not a party to the stipulation and it is not binding
4 on him. Ordinarily, the surety would therefore lack standing to
5 rescind the stipulation. At oral argument, however, counsel for
6 defendant Donnell Hatcher joined in the surety's motion to
7 rescind the stipulation on the ground of mutual mistake.
8 Defendant, being a party to the stipulation, does have standing
9 to rescind it on that ground.

10 The government argues that the mistake as to the legal
11 effect of a statute of limitations was unilateral on the part of
12 the defendant, and that there was no "mistake" on the part of the
13 government at all. The court finds no reason to impute to the
14 government the bad faith that would be inherent in knowingly
15 prosecuting a bail forfeiture when it knew the statute of
16 limitations had run. It seems to the court that only because the
17 government and defendant were both mistaken as to the existence
18 of the six-year statute of limitations did the parties enter into
19 the stipulation. This mutual mistake reaches the very core of
20 the contract; indeed, the stipulation would in all likelihood not
21 exist if the parties had been aware of the statute of
22 limitations. This is the very kind of situation that the
23 doctrine of mutual mistake seeks to remedy by providing for
24 rescission of the agreement by either party.

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1 IT IS THEREFORE ORDERED that the surety's motion to set
2 aside the bond forfeiture be, and the same hereby is, GRANTED.

3 DATED: October 26, 2009

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6 WILLIAM B. SHUBB

7 UNITED STATES DISTRICT JUDGE
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